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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 580

MILTON K. YOUNG AND MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, A BODY POLITIC INCORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO, AND BRIEF IN SUPPORT THEREOF.

ROBERT M. CLARKE,
MILTON K. YOUNG,
CHARLES C. MONTGOMERY,
Counsel for Petitioners.

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COUNTY OF VENTURA, A BODY POLITIC INCORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Milton K. Young and Melissa E. Young, respectfully pray that a writ of certiorari issue to the District Court of Appeal of the State of California, Second Appellate District, Division Two, to review the judgment of said District Court of Appeal affirming the decree of the Superior Court of the State of California in and for the County of Ventura, in that certain action between the above-

named parties which is disclosed by the certified record accompanying this petition.

Opinion Below.

The opinion rendered by the District Court of Appeal is reported in 102 Cal. App. Dec. 127 (R. 32).

The decision of the District Court of Appeal was pronounced July 1, 1940, and became final July 31, 1940, and subject to review under Article VI, Section 4-c of the California State Constitution.

A petition was duly filed in the State Supreme Court for a hearing of the case after the said decision of the District Court of Appeal had become final. The petition for hearing was denied by the State Supreme Court August 29, 1940, making the decision final for the purpose of review by your Honorable Court.

Petitioners greatly regret the necessity of bringing to the attention of this Honorable Court the fact that the opinion of the District Court of Appeal does not at any point therein indicate that petitioners in their opening brief, or otherwise, argued or asserted their reliance upon, and claim to, the protection of the due process and equality clauses of the Fourteenth Amendment to the Constitution of the United States.

Conceiving that this Court may be led by the silence of the opinion in the respect mentioned, to the conclusion that petitioners have not presented the Federal constitutional questions in their briefs, petitioners deem it their duty to present to this Court a few of many quotations that could be made, from petitioners' opening and the respondent's reply briefs, and also from the petitioners' oral argument in the District Court of Appeal and in their petition to the Supreme Court of California, to hear the cause after the decision of the District Court of Appeal—to the end

that it may be affirmatively shown that petitioners have not been derelict in their duty as to the presentation of the Federal questions.

Appellants' opening brief in the District Court of Appeal says, at p. 13:

> * * * "In the manner indicated by the above heading, the respondent County of Ventura runs counter to the 14th Amendment to the Constitution; first, it inundates appellants' property by the diversion of storm waters, which amounts to the taking thereof without due process of law, and second, when appellants seek by action to recover damages for the prohibited taking of their property, it pleads a state statute (Act 5149, Stats. 1931, p. 2475) which, as construed by the court on demurrer, forbids the prosecution of the action pursuant to a constitutional guaranty because appellants did not file their claim within ninety days 'after the accident has occurred'—can the due process clause of the 14th Amendment be thus thwarted by a state statute, particularly by this statute? *That is the question—that is the issue in this case.*"

Respondent's reply brief in the District Court of Appeal, at p. 34, says:

> "We submit that unless Act 5149 does indeed violate due process as prohibited by section 13, article I of the Constitution of California, *or section 1 of the Fourteenth Amendment to the Federal Constitution*, the demurrer to the complaint here under scrutiny by the Court must be sustained."

Petitioners, at the oral argument in the District Court of Appeal, said:

> "Mr. Young: The cornerstone of plaintiffs' case is the Fourteenth Amendment to the Constitution. You will bear in mind that this case arises by reason of the unlawful diversion of the waters of Nigger Canyon, by which acts the storm waters were diverted toward

> the plaintiffs' land, the natural course of the stream having been in another direction. * * *"

And in their petition for hearing of said cause before the Supreme Court of California, petitioners said, in their first assignment of error, at page 2:

> "(1) Said decision is in error in its failure to notice and decide the validity or invalidity of Act 5149, Deering's General Laws (Stats. 1931), p. 2475, under the due process clause of the Fourteenth Amendment to the Constitution of the United States. * * *")

Jurisdictional Statement.

Jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code, 28 U. S. C., Sec. 344 (b), allowing certiorari to a State court of last resort.

This Court has jurisdiction of this case by reason of the decision rendered herein by the District Court of Appeal of the State of California, Second Appellate District, Division Two, on the 1st day of July, 1940, wherein the application of a State statute, Act 5149, Deering's General Laws (Stats. of California), 1931, p. 2475, set forth in full in the appendix hereof, p. 32, has deprived petitioners of their property and property rights in violation of the due process and equality provisions of the Fourteenth Amendment to the Constitution of the United States.

Said statute so applied is repugnant to the Constitution of the United States. The statute is not applicable to petitioners' case. Applying it thereto in itself is a violation of the constitutional provisions.

The action was brought for the recovery of compensation for the damaging and taking of petitioners' property for public use without compensation, by reason of the act of the defendant County, respondent, in diverting storm waters so they overflowed petitioners' land. The question is sub-

stantial as it involves the question whether the due process and equality clauses of the Fourteenth Amendment may be nullified by the State statute, it is repugnant to the Constitution, and petitioners have, by the decision, been deprived of their property without compensation without due process of law and have been denied equality before the law.

The legal issue arose upon the pleadings, the petitioners, as plaintiffs, having pleaded in their complaint that their property had been damaged and taken for public use without compensation, and that they had been denied due process and equality, as guaranteed by the Fourteenth Amendment to the Constitution (R. 8).

The defendant County, respondent, filed a special and general demurrer, under which it was contended that the claim of plaintiffs was not filed within the time limited by Act 5149, Deering's General Laws (Stat. 1931), p. 2475; that action was barred by said statute, and that there was no pleading that the injury occurred within ninety days prior to the time of the filing of the plaintiffs' claim.

The Superior Court sustained the demurrer without leave to amend (R. 30). An appeal was taken to the Supreme Court of the State of California from said judgment on December 30, 1939 (R. 31). The Supreme Court transferred the case to the District Court of Appeal, Second Appellate District, which affirmed the judgment of the Superior Court.

The constitutional questions pleaded in the complaint, as above mentioned and referred to in defendant's demurrer and points and authorities, were argued by the respective parties in their briefs in the District Court of Appeal, and petitioners, in their oral argument before that court, restricted their argument to the Federal constitutional questions.

In their petition to the Supreme Court for a hearing of the cause after the decision in the District Court of Appeal, petitioners argued said constitutional questions, and the defendant County, respondent, in their answer to the said petition, argued the said questions.

The decision of the District Court of Appeal in this case is the only decision ever rendered in the State of California in which there has been presented the question of the repugnance of Act 5149 to the Fourteenth Amendment to the Constitution. No statute of limitations for such limited period, concerning damages to real property, has ever before been enacted in this State, or any other State, so far as petitioners' very extensive examination discloses.

Section 1 of Act 5149 provides:

> "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."
>
> (Statute in full set out in appendix, p. 32.)

Petitioners deem it proper at this point to note the omission from the above section of the statute of designation of flood control districts, concerning which denial of equality between property owners in such flood control districts and property owners in the specified localities will be more fully presented, in the supporting brief herewith.

Statement of the Case.

Plaintiffs, petitioners herein, sued in the Superior Court of the County of Ventura, State of California, for compen-

sation under the due process clause of the Fourteenth Amendment for the damaging of their agricultural property for public use by reason of the said county's wrongful diversion of storm waters from their natural course, which caused the inundation of their said lands and the impairment, injury and destruction of many of the trees of the orange grove thereon.

Two causes of action are stated in the complaint. The first sets out the facts in the form of a common law action (R. 1-9); the second count repeats by reference the facts alleged in the first cause of action and in Paragraph III of said second cause of action claims the benefit and protection of the Fourteenth Amendment as the same relates to the denial of due process of law (R. 8), and in Paragraph IV alleges in substance that the damaging of plaintiffs' property constituted the taking thereof without due process of law, as prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States and also constituted denial to plaintiffs of equal protection of the laws of the United States prohibited by said Section 1 of said Fourteenth Amendment (R. 8).

The complaint alleges the impossibility of ascertaining the extent of the injuries and the amount of damages to petitioners' orchard prior to the date of the filing of the claim with the Board of Supervisors of the County of Ventura, December 28th, 1938, and further alleges the rejection of said claim by said Board on about January 17, 1939 (R. 6-7-8). Said claim is shown in Exhibit "A" of the complaint, in which it is set forth that the materials and manual labor work required for the restoration of the inundated premises began on March 7, 1938, and ended October 29, 1938 (R. 15-26) and that the last contract work for bulkheading of embankment ended October 24, 1938 (R. 17-18).

The complaint was filed in the Superior Court of the County of Ventura, State of California, on the 27th day of February, 1939.

The defendant county filed a demurrer to said complaint, special and general, particularly on the ground that it "does not state facts sufficient to constitute a cause of action" (R. 27) and filed points and authorities as to the basis of their demurrer (R. 29).

The contention made by the defendant was that the claim of said plaintiffs was not filed within the time limited by Act 5149, Deering's General Laws (Stats. 1931), p. 2475 (*Yonker* v. *City of San Gabriel*, 23 Cal. App. (2d) 556), and that the action was barred by said statute and that there was no pleading that the injury occurred within ninety (90) days prior to the time of filing the plaintiffs' claim.

Also defendant's points and authorities on demurrer allege that Act 5149, and other similar statutes, do not violate the Fourteenth Amendment (R. 30).

The Superior Court sustained the demurrer without leave to amend on the 20th day of November, 1939 (R. 30), and judgment "that plaintiffs take nothing by their action" was entered December 7, 1939 (R. 30). Notice of appeal to the Supreme Court of the State of California from said judgment and from the whole thereof was dated, served and filed December 20, 1939 (R. 31).

The case was transferred for hearing by the Supreme Court to the District Court of Appeal, Second Appellate District, State of California, which in due course rendered its opinion affirming the judgment of the Superior Court. Petition for hearing of said case after the decision of the District Court of Appeal by the Supreme Court, was denied by that court August 29, 1940 (R. 38).

Questions Presented.

(1) Whether Act 5149, Deering's General Laws (Stats. 1931), p. 2475, applies to, or, in any manner comprehends, a cause of action for the recovery of compensation for the damaging and taking of real property (R. 35);

(2) Whether Act 5149 as construed by the District Court of Appeal is repugnant to the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States (R. 33-34);

(3) Whether Act 5149 as construed by the District Court of Appeal, has deprived petitioners of their property without due process of law;

(4) Whether the provision of Section 1 of Act 5149, to the effect that claims for damages must be filed within ninety days after the "accident", is unreasonable and unconstitutional. In this case injuries to the trees of the orange orchard did not develop for a period of more than nine months (R. 6) and the period of time required for the restoration of the land and the orange grove thereon and the ascertainment of the cost thereof, required a period of seven months twenty-seven days (R. 26);

(5) Whether the District Court of Appeal should not have construed said Section 1 of Act 5149 in connection with Section 4075, Political Code (appendix, p. 33), a general law on the subject of claims against counties wherein it is provided that all claims must be itemized and that claims, including a damage claim, may be filed within one year after the last item set forth therein;

(6) Whether the statute by reason of not including flood control districts exempts such districts from the requirement that claims for damages be filed within ninety days and whether the statute thereby exempts the owners of

property within flood control districts and denies equality to the owners of property in the municipalities, counties, etc., named in the statute;

(7) Whether the provision of Section 2 of said Act, to the effect that special counsel may be employed to have charge of a suit against a municipality, county, city and county, or school district, as the case may be, and the provision of Section 4 thereof to the effect that such special counsel, when employed, shall approve the terms of any compromise by city, county or school district, etc., deprives a board of supervisors of a county of power to compromise a claim and delegates such power in the specially employed attorney, thus preventing the claimant from having an independent decision by the board on the compromise of his claims, as provided by Political Code Section 4075-4076, resulting in the denial of due process.

Reasons Relied on for Allowance of Writ.

(1) The State Court has decided a Federal question of substance not heretofore determined by this Court, to-wit, whether or not Section 1 of the Fourteenth Amendment to the United States Constitution may be invoked when the same has been violated by a county in the diversion for public use of flood waters onto plaintiffs' land, to their serious damage and the damage, impairment and partial destruction of their said land, when the claim for said damages was not filed within the time prescribed by a special statute, Act 5149 Deering's General Laws (Stats. 1931) p. 2475, notwithstanding the claim was presented to the proper body within the time prescribed by general laws, to-wit, Section 4075 of the Political Code of the State of California, and notwithstanding no such statute of limitations may unreasonably, if at all, restrict plaintiffs' constitutional rights. (Appendix, p. 33.)

(2) The State Court has decided such questions in a way not in accord with applicable decisions of this Court, to wit:

Wrongful Diversion of Flood Waters onto privately owned Lands Without Compensation is not Due Process of Law and Denies Equal Protection of Law:

Pumpelly v. *Green Bay, etc.*, 13 Wall. 166, 20 L. Ed. 557;
United States v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539;
Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243;
United States v. *Cress*, 243 U. S. 316, 61 L. Ed. 746;
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393-422, 67 L. Ed. 322.

Improperly Applying a Non-applicable Statute of Limitations is not Due Process of Law:

Board of Commissioners Jackson Co. v. *U. S.*, 100 F. (2d) 929, modified on certiorari in another respect, 84 L. Ed. Adv. Op. (No. 4), p. 233;
Home Insurance Co. v. *Dick*, 281 U. S. 397, 407, 74 L. Ed. 926, 923;
Hartford A. & I. Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178.

The State statute improperly applied as to filing claim within ninety days after the "accident" is Act 5149 Deering's General Laws (Stats. 1931) p. 2475. No "accident" is involved here.

The applicable section of the code, with which plaintiffs claim fully complies, is section 4075 of the Political Code, set out in the appendix.

Conclusion.

The question is an important one because there is probably not another State in the Union where so much litigation has arisen as in California, by reason of the diversion

of storm and river waters from their natural courses. The question is important in the mining districts and rice plantations in the northern part of the State, in the orange growing districts of central and southern California, and in the alfalfa regions of the entire State. The question is important to the public officials of each county of the State. The question is important to the owners of agricultural lands in reference to their right to receive just compensation when their property has been damaged and taken for public use, and also the question is important as between the owners of land in counties without flood control districts and the owners of land in counties where such districts exist.

In as much as the State Supreme Court has declined to pass upon the questions presented in this case, in the denial of a petition for the hearing thereof, it is extremely important that a decision be rendered by this Honorable Court in reference to the repugnance of the statute in question to the Constitution of the United States, and particularly the due process and equality provisions of the Fourteenth Amendment thereof.

For these reasons, it is respectfully submitted that this petition should be granted.

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MILTON K. YOUNG,
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